Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36689/2013
IA/36674/2013
IA/20759/2013
IA/36718/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2014	**On 30 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR GOODWIN GULAMPINGO ZIGONA
MRS MERCY ZIGONA
MISS ETHEL GULAMPINGO ZIGONA
MASTER EMMANUEL GULAMPINGO ZIGONA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Jaisri of Counsel
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Malawi born respectively on 16 October 1972, 27 August 1963, 2 February 1994 and 11 September 1998.

2. They applied for variation of their leave to remain which was refused by the respondent in a decision dated 20 August 2013 because it was considered they failed to satisfy Appendix FM and paragraph 276ADE. The appellants' appeals against the respondent's refusal were allowed by Judge Parker in a determination promulgated on 12 February 2014. The grounds claim the judge arguably made a misdirection in law. The grounds argued that the judge's reasons for allowing the appeals under the Rules in respect of the first and second appellants (mother and father of the third and fourth appellants), although unclear, appeared to be based on the fourth appellant Emmanuel and his success under paragraph 276ADE. The grounds claimed the judge's findings on that point were inadequate and did not properly establish that the appropriate reasonableness test had been applied. The judge was wrong to conclude that the success of Emmanuel under the Rules meant by extension that it would be unreasonable for him to return to Malawi with his family. The family would be removed together such that their right to family life would be protected. Emmanuel's best interests were served by having access to both parents and his sibling and those needs could be met whether the family were in the UK or Malawi. Further, that the appellants' rights under Article 8 did not confer a choice as to where they wished to enjoy their family life. The respondent relied upon **Zoumbas [2013] UKSC 74** at [24]:

> *"There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominately in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion. "*

3. **Nasim and others (Article 8) [2008] UKUT 00025 (IAC)** held that:

> *"The judgments of the Supreme Court in **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72** served to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.*
>
> *A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary*

of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control."

4. Judge Chohan granted permission to appeal on 13 March 2014. He found it was not absolutely clear from the determination on which basis the fourth appellant's appeal was allowed. At [30] and [31] although the judge said he was not at that point considering Article 8, it seemed that an Article 8 consideration had been undertaken in respect of the fourth appellant. The judge concluded that the fourth appellant could not relocate to Malawi and on that basis he allowed the appeals of the parents, the first and second appellants under Section EX.1 of Appendix FM. Judge Chohan said it seemed the judge had considered that paragraph in isolation although he said at [32] *"There is no suggestion that the relationship and the suitability paragraphs are not satisfied ……".* However, at [25] Judge Chohan found it was clear that the respondent's representative made a submission to the effect that the appellants did not meet the requirements of the Immigration Rules and it is now established that Section EX.1 is not free standing (**Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)**). Judge Chohan found further that in respect of the Article 8 assessment it was open to argument that the judge failed to give adequate reasons as to why the family as a whole could not return to Malawi.

5. I found the judge's reasoning and conclusions inadequate and gave my reasons at [9] – [12] of my determination promulgated on 28 April 2014.

6. Thus the matter came before me to be re-made. Mr Jaisri and Mr Tarlow confirmed that there were no issues arising from the facts such that none of the appellants gave oral evidence. Their evidence is contained in two bundles prepared for the first hearing in January of this year plus an updated bundle which in some regards duplicates what was said before. I will summarise the evidence as necessary in the course of explaining the reasons for my decision. I have considered each item of evidence and have reviewed that evidence in the round. The fact that I have not specifically referred to any particular piece of evidence in my determination does not mean that the evidence has not been considered in the manner I have described.

7. Mr Tarlow made submissions on behalf of the respondent and Mr Jaisri on behalf of the appellants. I have made a note of their submissions in my Record of Proceedings and have taken them into consideration.

Findings and Conclusions

8. In this appeal, the burden lies with the appellants to prove the facts and matters they rely upon. Their case was advanced on the basis that because Emmanuel satisfied paragraph 276ADE(iv) and because those particular circumstances where he satisfies the Rules but the rest of his family do not are not covered by the Rules, then the circumstances are compelling and/or extraordinary such that I should go on to consider Article 8 in terms of the proportionality of the respondent's decision. The

standard of proof is that of a balance of probabilities. (See the determination in **EH (Iraq) [2005] UKIAT 00065)**.

9. To make a decision regarding the appellants' particular circumstances, it is instructive to set out the development of Article 8 case law in **MF** in the Upper Tribunal and the Court of Appeal. **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)** found that the new Immigration Rules were not a "complete code" when it came to Article 8 claims as decisions still had to be compliant with Section 6 of the Human Rights Act 1998 [25]. The assessment remained in two stages, first the application of the Rules and second, the application of Article 8 [32]–[41]. In one important respect, the new Rules affected the second stage Article 8 assessment because they gave greater specificity to which circumstances attracted the greatest weight in the public interest. The degree to which the new Rules changed the interpretation of the public interest should not be exaggerated. Previous case law held that the proportionality assessment did not treat the public interest as immutable such that the Upper Tribunal found that in most cases, the new Rules established an "exceptionality threshold" for the public interest to be outweighed [42]–[45].

10. **MF (Nigeria) [2013] EWCA Civ 1192** held it was not in dispute that the case law provided that an appeal in a removal or deportation case involved two stages. First, to assess whether the decision appealed against was in accordance with the Immigration Rules and second, to determine whether the decision was contrary to the appellant's Article 8 rights [7]. The Court of Appeal found that the picture that had emerged from the Secretary of State as to what was meant by "exceptional circumstances" under paragraph 398 was "by no means entirely clear" [15]. In **Izuazu (Article 8 – new Rules) [2013] UKUT 00045** the Secretary of State argued that the new Rules restored the "exceptional circumstances" test that was disapproved by the House of Lords in **Huang** but the Court of Appeal found that was a surprising submission bearing in mind that the House of Lords had rejected the exceptionality test [31] – [32].

11. The Rules are a detailed expression of government policy on controlling immigration and protecting the public and the Article 8 sections reflect the Secretary of State's view as to where the balance lies between the individual's rights and the public interest. The judge must consider proportionality in the light of that expression of public policy. Various cases have confirmed this approach **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)**, **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)** in particular headnote (vi):

> *" (vi) Where an area of the rules does not have such an express mechanism, the approach in **R (Nagre) v Secretary of State for the Home Department** [2013] EWHC 720 (Admin) ([29]-[31] in particular) and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8*

purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

12. **Iftikhar Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin)** held it is settled law that considerations under Article 8 are embedded in the Immigration Rules such that if the Secretary of State applied those Rules then ordinarily, Article 8 considerations would have been fully catered for. In the instant case, no good arguable grounds had been advanced that there had been factors particular to the claimant that had not been capable of being assessed from within the existing framework of Rules and which therefore needed to be assessed outside of the Rules. Further the Secretary of State had taken into account all of the factors and matters which had been relevant to the claimant. Finally, there had been no error of law in the approach adopted by the Secretary of State to the question of whether there had been insurmountable obstacles to relocation.

13. What Mr Jaisri says is that the appellants' circumstances can be distinguished from those in **Iftikhar Ahmed.** That is because the Rules failed to envisage a situation where a child of the family might satisfy paragraph 276ADE (iv) such as in Emmanuel's case, but the other members of the family failed to satisfy paragraph 276ADE. The view of the respondent was that the appellants could return to Malawi as a family unit but the refusal did not take into account the fact that firstly Emmanuel satisfied the Rules and secondly that there was no separate assessment of his best interests in those circumstances. Mr Tarlow relied upon **Gulshan** at [24]. He told me that there needed to be compelling circumstances which were not dealt with under the Rules to engage Article 8 and there was nothing compelling in the appellants' circumstances.

14. I find that Mr Tarlow's submission fails to take account of this particular family's unusual circumstances. As regards the three appellants who did not satisfy the rules, there were arguably good grounds for granting leave to remain outside the rules. That was because Emmanuel satisfied the Rules, whereas the rest of his family did not; that was a situation not recognised under the Rules. See **Nagre** at [28] – [29]:

"As appears from the new guidance issued by the Secretary of State in relation to exercise of her residual discretion to grant leave to remain outside the Rules, as set out above, and as Mr Peckover makes clear in his witness statement, the new rules contemplate that there will be some cases in which a right to remain based on Article 8 can be established, even though falling outside the new rules. Therefore, the basic framework of analysis contemplated by Lord Bingham in Huang continues to apply, as was recognised by the Upper Tribunal in Izuazu.

Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider

whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

15. I find as regards this particular family's circumstances that there were arguably compelling circumstances not sufficiently recognised under the Rules as envisaged in **Nagre.** I proceed to consider what Mr Tarlow referred to as the second stage of the Article 8 considerations.

16. Article 8 of ECHR states:

(i) Everyone has the right to respect for his private and family life, his home and his correspondence.

(ii) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

17. In **Razgar [2004] UKHL 27** Lord Bingham gave guidance at paragraph 17 as to the correct approach when dealing with Article 8 as follows:

"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must consider:

(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?

(ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

18. **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)** provided that the best interests of children have to be a primary consideration, meaning that they have to be considered first. Broadly speaking, the best interests of the child mean the wellbeing of the child. **ZH (Tanzania) [2011] UKSC 4** provided that the over-arching issue is the weight to be given to the best interests of children who are

affected by the decision to remove or deport one or both of their parents and in what circumstances it is permissible to do so where the effect will be that a child who is a British citizen will also have to leave. See also **Omotunde (Best Interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247 (IAC)**. There is no substantial difference between a human rights based assessment of proportionality of any interference considered in **ZH** and the approach required by community law in **Zambrano [2011] EUECJ Case C-34/09 OJ 2011 C130-2**. In this particular context the Article 8 assessment questions set out in **Razgar** should be tailored as follows, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim:

(a) Is there family life enjoyed between the appellant and a minor child that requires respect in the context of immigration decision making?

(b) Would deportation of the parent interfere with the enjoyment of that family life?

(c) Is such an interference in accordance with the law?

(d) Is such an interference in pursuit of a legitimate aim?

(e) Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?

19. **E-A (Article 8 – Best Interests of Child) Nigeria [2011] UKUT 00315 (IAC)** Mr Justice Blake and SIJ Jarvis said:

> "(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.
>
> (ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.
>
> (iii) During a child's very early years, he or she will be primarily focused on self and the caring parents or guardians. Long residence once the child is

likely to have formed ties outside the family is likely to have greater impact on his or her well being.

(iv) Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.

(v) The Supreme Court in **ZH (Tanzania)** was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own."

20. See the headnote in **Azimi-Moayed and Others (Decisions Affecting Children; Onward Appeals) [2013] UKUT 00197 (IAC):**

"**Decisions affecting children**

(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any

event, protection of the economic well-being of society amply justifies removal in such cases.

21. In **VW [2009] EWCA Civ 5** the Court of Appeal held that in assessing proportionality and whether an appellant's family should return to his country of origin with him, the test is not whether there are insurmountable obstacles to prevent their going but whether it is reasonable to expect them to go. If there are insurmountable obstacles, they will succeed but if there are not, they will not necessarily fail.

22. As I indicated, the facts were not in dispute. The family came to the United Kingdom in the autumn and winter of 2004 as dependants of Goodwin Zigona who studied for a Degree in Theology and Masters. Mr Zigona had leave until April 2013 when his Tier 4 visa expired. Prior to its expiry there was an application for further leave to remain based upon the family's private and family life in the United Kingdom and in particular the fact that as of December 2013, Emmanuel had seven years' residence. Mr Zigona works as a carer with Dimensions. He said that in February 2013 he had a seizure and sees a neurologist every four months. As I understand it, there have been no implications arising although Mr Zigona said that there are very few neurologists in Malawi and it would be difficult for him to obtain treatment there leaving aside the fact that it would be financially costly.

23. Mercy Zigona works for Care UK helping the elderly and also with Jigsaw Creative Care, as a support worker for people with learning difficulties. The family rent a three bedroomed home in Bracknell and are active members of the Living Waters Global Church which is of a Pentecostal denomination. Mrs Zigona explained that when she and her husband came to the United Kingdom they anticipated they would return to Malawi but after living here for upwards of nine years, they have all made the United Kingdom their home.

24. Ethel Zigona came here aged 11. She is involved in her parents' church as is Emmanuel but also helps out at the Amazing Grace Church and the Reading Community Soup Kitchen. Her statement says that she is in the process of applying for an apprenticeship in business marketing, sales or finance and has had various employment. She has been educated to A Level standard in the United Kingdom.

25. Emmanuel is studying for his GCSEs. He is a keen school sportsman as well as being a member of AFC Warfield Football Club. Like his parents and sister, he is a committed member of his church and sings in the choir. He came here aged 6. He is now 15.

26. It is clear that all the family are worried about Mr Zigona's health, however, there was no evidence before me that his seizure has ever been diagnosed conclusively and there was no suggestion from Mr Jaisri that his medical circumstances were significant in terms of the balancing exercise I must carry out.

27. Mr Tarlow did not dispute any of the claims made in the appellants' statements. The appellants' statements make it clear that they consider their lives to be here in the United Kingdom. Mr and Mrs Zigona speak the native language Chichewa. Ethel said that she cannot speak Chichewa well. Emmanuel claimed not to speak Chichewa at all. I accept that all four appellants would find it difficult to re-establish themselves in Malawi. I accept from what they say in their statements that they find life here considerably more desirable both as regards education for the children, employment opportunities and lifestyle. They have put down roots, made friends, have relatives here and wholly integrated themselves into British society. Nevertheless, it is trite law that they cannot choose where in the world they wish to live. I will consider the implications.

28. There was no suggestion put to me that the family would ever be split up. That is, there was no suggestion that because Emmanuel satisfies the Immigration Rules, that he might remain and the rest of the family return to Malawi. This is a stable and cohesive family unit, inter-dependent and mutually supportive. I take into account the case law affecting children I have set out above and consider the circumstances. I find the interdependency of this family is such that it is in all of their interests and certainly in the best interests of Emmanuel that they live together.

29. I bear in mind headnote (ii) of **E-A**. See [19] above. The fact that Emmanuel has been here so long and from such an early age is a weighty consideration in the balance of competing considerations. He has put down roots. His personal identity has developed. He has formed friendships and links with the community outside the family unit. The same applies to Ethel although she is no longer a child but an adult young woman. Emmanuel and Ethel have grown up in the United Kingdom. Whilst their primary focus in early years was upon their parents, given the length of time they have both lived here, they have formed extensive ties with the wider community. See **Azimi** headnotes (ii) and (iii) at [20] above. The considerable testimonies from those they have come across whether via education, social activities, sporting activities, church and employment are testament to their successful integration into British society. I take into account the benefit of stability and continuity of Emmanuel and Ethel's social and educational provision. There was no evidence before me regarding what educational provision might be made for Emmanuel in Malawi, however, I find the potential disruption of his studies at a time when he is about to embark upon GCSEs to be considerable and certainly not in his best interests. I find the upheaval would inevitably adversely affect his ability to settle into a new educational regime and adversely affect his ability to learn. I find he is unlikely to be able to take up his education in Malawi where he left off in the United Kingdom.

30. This is a family who have lived lawfully in the United Kingdom for a long time. They have never been reliant upon state benefits. Leaving aside the respondent's duty to maintain immigration control, there was no suggestion by Mr Tarlow that there are any public policy issues requiring their removal. Of course, Mr and Mrs Zigona have

lived the majority of their lives in their own country but that is not the case with regard to Emmanuel and Ethel whose lives have been fundamentally moulded by their experiences here. I have no doubt that this very stable family would make the best of any forced return to Malawi but I am not satisfied bearing in mind particularly the best interests of Emmanuel, but also taking into account **VW [2009] EWCA Civ 5** that it is reasonable to expect them to go. After a ten year effluxion of time they now have no home to return to in Malawi. They now have no close relatives there whereas there are various close family members in the United Kingdom who they see on a regular basis. The instability of Mr and Mrs Zigona in terms of no home or employment to return to, will I find adversely impact upon Emmanuel and Ethel.

31. The family might have initially come here as the dependants of student Mr Goodwin Zigona with no expectation of remaining, however, the passage of time has inevitably changed their circumstances which can be distinguished from those considered by the Supreme Court in **Patel UKSC 72** ; in particular at [57]. Mr Zigona is no longer a student. The respondent was content to grant this family leave over a decade. Inevitably that approach by the respondent has had implications in terms of the family's integration here and expectations for the future.

32. Their circumstances can be distinguished from those in **Zoumbas** where the needs of the children because of their tender years, could only be fully met within the family unit; the circumstances of Emmanuel and Ethel are very different as I have set out above at [27]-[29].

33. For all of these reasons, I find it is not reasonable to expect them to return to Malawi.

Conclusion

34. I accept that removing the appellants would interfere with their right to respect to family and private life of such gravity as to potentially engage Article 8. Of course, such interference would be in accordance with the law in the interests of maintaining immigration control. The issue for me must be the proportionality of the respondent's decision insofar as the refusal affecting Mr and Mrs Zigona and Ethel bears upon the circumstances of Emmanuel. For all of the reasons I have set out, I find that looking at the situation in the round, the respondent's decision is disproportionate. I make that finding respecting the balance between the public interest and family and private rights and finding that the appellants' circumstances are such on these particular facts to demand an outcome in their favour. I re-make the decision by allowing the appeal.

Decision

35. Appeal allowed on human rights grounds – Article 8.

No anonymity direction is made.

Signed Date 27 June 2014

Deputy Upper Tribunal Judge Peart

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00

Signed Date 27 June 2014

Deputy Upper Tribunal Judge Peart